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In the Supreme Court of the United States

No. 811.

OCTOBER TERM, 1970.

SOCIALIST LABOR PARTY, *et al.*,

Appellants,

vs.

JAMES A. RHODES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

Appellants appeal from that part of the judgment of the three-judge United States District Court for the Southern District of Ohio, Eastern Division, upholding the constitutionality of Ohio's election loyalty oath, Section 3517.07, Ohio Revised Code, and denying appellants declaratory and injunctive relief.

OPINIONS BELOW.

The District Court's opinion, as yet unreported, was rendered on July 29, 1970 and is appended in the Jurisdictional Statement in *Sweetenham v. Rhodes,* Oct. Term 1970, previously filed in this Court.

JURISDICTION.

This case involves a challenge to the constitutionality of several Ohio election statutes. The action was filed pursuant to 42 U.S.C. 1981, 1983 and 1988; 28 U.S.C. 1343 (3) and (4); 28 U.S.C. 2201 and 2202; and Amendments I and XIV of the United States Constitution. The jurisdiction of the Supreme Court of the United States to review this judgment on appeal is conferred by 28 U.S.C. Sections 1253 and 2101. The District Court's order was entered on July 29, 1970. Of the three causes of action contained in the Complaint, the District Court found for appellants on the first two and for appellees on the third. Partial declaratory and injunctive relief was accorded appellants. Appellees' notice of appeal from the judgment on the first two causes of action was filed on August 17, 1970. Appellants' appeal from the judgment rendered against them on the third cause of action was filed on the same date.

Sustaining this Court's jurisdiction in the subject case is *Williams v. Rhodes*, 393 U.S. 23 (1968).

STATUTE INVOLVED.

To be decided on this appeal is the constitutionality of Ohio's election loyalty oath, Section 3517.07, Ohio Revised Code, which provides:

> No political party or group which advocates, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or which carries on a program of sedition or treason by radio, speech, or press or which has in any manner any connection with any foreign government or power or which in any manner has any connection with any group or organization so connected or so advocating the overthrow, by force or violence, of our local, state, or national government or so carrying on

a program of sedition or treason by radio, speech, or press shall be recognized or be given a place on the ballot in any primary or general election held in the state or in any political subdivision thereof.

Any party or group desiring to have a place on the ballot shall file with the secretary of state and with the board of elections in each county in which it desires to have a place on the ballot an affidavit made by not less than ten members of such party, not less than three of whom shall be executive officers thereof, under oath stating that it does not advocate, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government; that it does not carry on any program of sedition or treason by radio, speech, or press; that it has no connection with any foreign government or power; that it has no connection with any group or organization so connected or so advocating, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or so carrying on a program of sedition or treason by radio, speech, or press.

Said affidavit shall be filed not less than six nor more than nine months prior to the primary or general election in which the party or group desires to have a place on the ballot. The secretary of state shall investigate the facts appearing in the affidavit and shall within sixty days after the filing thereof find and certify whether or not this party or group is entitled under this section to have a place on the ballot.

Any qualified member of such party or group or any elector of this state may appeal from the finding of the secretary of state to the supreme court of Ohio.

This section does not apply to any political party or group which has had a place on the ballot in each national and gubernatorial election since the year 1900.

QUESTIONS PRESENTED.

1. Does Ohio's election loyalty oath statute violate the First Amendment of the United States Constitution?

2. Does Ohio's election loyalty oath statute violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

3. Does Ohio's election loyalty oath statute violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE.

The Socialist Labor Party has an old and well-established branch in the State of Ohio which has nominated and run candidates for office since 1895. In 1968 the Party's write-in candidate for President of the United States received 120 votes in Ohio. In 1969 the Party ran a candidate for Mayor of Cleveland and in 1970 its state convention nominated candidates for United States Senate and for governor.

The Socialist Labor Party filed the subject action on January 28, 1970, seeking ballot status for its candidates in the November, 1970 general election and recognition of the party for future Ohio elections. The Complaint asserted three causes of action all challenging the constitutionality of Ohio election statutes affecting the formation, structure and recognition of political parties. The first cause of action places in issue the seven percent requirement for new political parties;[1] the second complains of a

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[1] Ohio had formerly required a new political party seeking official ballot status to collect signatures from electors equal in number to at least 15% of those voting for governor in the preceding gubernatorial election. This provision was voided by this Court on October 15, 1968 in *Williams v. Rhodes, supra.* The Ohio legislature then adopted the 7% requirement.

series of statutes, which, *inter alia,* require Ohio political parties to have a highly developed and massive statewide apparatus with hundreds of officials and at least 1200 members. (See footnote 1 to *Williams v. Rhodes,* 393 U.S. 23 at 25); and the third seeks to invalidate Ohio's election loyalty oath.

The case was heard by a three-judge court following the filing of motions for summary judgment. The Court rendered judgment for plaintiffs on their first two causes of action and ordered the names of plaintiffs' candidates for governor and United States senator placed on the Ohio ballot for the November, 1970, general election. The constitutionality of the loyalty oath, however, was upheld. Plaintiffs had not signed the loyalty oath; nor did the Court require them to sign it as a condition for being on the ballot. However, the Court refused to grant a permanent injunction refraining the defendants from enforcing the oath requirement as prayed for in paragraph (2) of the Complaint.

In upholding the loyalty oath, the District Court noted:

> Plaintiffs contend that Section 3517.07 (1) bars from the ballot political parties which abstractly advocate the overthrow of the government by force and violence, (2) abridges associational rights, (3) is overly broad, (4) is impermissibly vague, (5) violates due process because it places the burden of proving loyalty on the political party and (6) violates the Equal Protection Clause by excepting the Democratic and Republican Parties from its ambit.

The Court dealt only with the first and third of these contentions. It acknowledged that "Section 3517.07 is overly broad on its face in that it attempts to prohibit mere advocacy." (Appendix p. 23) However, based upon its interpretation of *Beck v. Hummel,* 150 Ohio St. 127, 80

N.E. 2d 899 (1948), the Court determined that the statute had been narrowly construed so as to pass constitutional muster. Invoking *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951) as controlling authority, the Court concluded

> that Section 3517.07, Ohio Revised Code, narrowly construed to require an oath that (1) the party is not engaged in an attempt to overthrow the government by force or violence, (2) the party does not carry on a program of sedition or treason as defined by the criminal law and (3) the party is not knowingly associated with a group attempting to overthrow the government by force or violence, is constitutional.

THE QUESTIONS ARE SUBSTANTIAL.

This Court has repeatedly given full plenary consideration to loyalty oath cases because the questions posed by them are of substantial constitutional concern. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Whitehill v. Elkins*, 389 U.S. 54 (1967). Where imposed as a condition for a political party to secure a place on the ballot, a loyalty oath can cripple or even destroy the process of free elections. Since any infringement on the right to run for office or to cast a ballot is of grave constitutional concern, Ohio's election loyalty oath statute—which has already been invoked once by the Ohio Secretary of State to deny a political group a place on the ballot[2]—warrants the closest judicial scrutiny.

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[2] The Secretary's ruling that the Progressive Party had Communist links disqualifying it from the ballot under the loyalty oath statute was reversed on appeal to the Ohio Supreme Court. See *Beck v. Hummel*, 150 Ohio St. 127, 80 N.E.2d 899 (1948).

I.

Ohio's Election Loyalty Oath Raises Substantial First Amendment Questions Because It Is Overly Broad, Prohibits Abstract Advocacy of the Overthrow of the Government by Force and Violence, and Interferes with Associational Rights.

The mere reading of Section 3517.07, Ohio Revised Code, is sufficient to indict it on First Amendment grounds. One phrase of the statute follows another in a seemingly endless labyrinth of prohibitions. Among the statute's several fatal flaws, it bars protected forms of advocacy. See *Keyishian v. Board of Regents, supra.* The proscriptions on advocacy contained in the oath are nowhere confined to the strict limits established by this Court in *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

The District Court seeks to save the statute by construing it narrowly. It claims that the Ohio Supreme Court's interpretation of the law in *Beck v. Hummel,* 150 Ohio St. 127, 137, 80 N.E.2d 899, 904 (1948) is controlling. But the constitutionality of the oath was *not* placed in issue in the *Beck* case. Nor did the Ohio Supreme Court specifically interpret or limit the reach of its language. While federal courts can only take the statute as the state courts read it, *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949), they cannot rewrite the statute to rid it of its infirmities.

Even as interpreted by the District Court, the loyalty oath statute is unconstitutional. While refining its prohibitions and delimiting its sweep the Court still approves unconstitutional curbs on associational rights because it holds that an oath may be required to show that "the party is not knowingly associated with a group attempting to overthrow the government by force or violence." Since "quasi-political parties or other groups * * * may em-

brace both legal and illegal aims," *Scales v. United States,* 367 U.S. 203, 229 (1961), a "blanket prohibition of association with a group having both legal and illegal aims" poses "a real danger that legitimate political expression or association would be impaired," *id.* and is unconstitutional. See also *Elfbrandt v. Russell,* 384 U.S. 11, 15-17 (1966).

Gerende v. Board of Supervisors, supra, is hardly authority for saving the Ohio oath, as the District Court suggests. The Gerende oath, as approved by this Court, does not invade associational rights; nor does it purport to bar groups carrying on programs of "sedition" or "treason." (See discussion of due process issue, *infra.*)

II.

Ohio's Election Loyalty Oath Statute Raises Substantial Due Process Questions Because (a) It Is Void for Vagueness and (b) It Places the Burden on the Political Party to Prove Its Loyalty Rather Than on the State to Prove the Party's Disloyalty.

(a) The Statute Violates Due Process Rights Because Its Language Is Impermissibly Vague.

Stricter standards of permissible statutory vagueness are applied to statutes having a potentially inhibiting effect upon rights guaranteed by the First Amendment of the United States Constitution. *Smith v. California,* 361 U.S. 147 (1959); *Cramp v. Board of Public Instruction, supra; Winters v. New York,* 333 U.S. 507 (1948); *Thornhill v. Alabama,* 310 U.S. 88 (1940). The Ohio statute is cluttered with vague language mandating its invalidation.

The words "sedition or treason," for example, appear in the statute no less than four times. But the words are

nowhere defined or explained.[3] In *Keyishian v. Board of Regents*, 385 U.S. 589, 598, (1967) this Court noted that:

> dangers fatal to First Amendment freedoms inhere in the word "seditions." See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-276. And the word "treasonable," if left undefined, is no less dangerously uncertain.

This Court unanimously struck a Florida loyalty oath in *Cramp v. Board of Public Instruction, supra*, for undue vagueness and uncertainty; yet that oath was far less ambiguous, less prolix, and more limited in scope than the one challenged here.

(b) The Statute Violates Due Process Rights by Placing the Burden on the Political Party to Prove Its Loyalty Rather Than on the State to Prove the Party's Disloyalty.

The procedure prescribed by 3517.07, Ohio Revised Code, is that the Secretary of State first investigates the new political party which has filed loyalty oath affidavits and if he deems the Party to be un-American or subversive, then he bars the Party from the ballot. The Party may appeal the Secretary's decision to the Ohio Supreme Court. This very scheme was struck down in *Speiser v. Randall*, 357 U.S. 513 (1958). The District Court acknowledges appellants' contention that the loyalty oath statute "violates due process because it places the burden of proving loyalty on the political party." Yet the Court ignores the argument entirely and makes no attempt to distinguish this case from *Speiser v. Randall, supra*.

Of further concern is the manner in which the Secre-

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[3] The District Court's opinion states that "sedition" shall be limited as defined by the state's criminal law. Appendix, p. 24, appended in Jurisdictional Statement, *Sweetenham v. Rhodes*, The only difficulty with this is that Ohio's criminal code nowhere defines "sedition."

tary of State makes his determination as to the Party's loyalty. As revealed in *Beck v. Hummel, supra,* the Party is denied the right to a hearing, to cross-examine witnesses and to state its own case. The Ohio Supreme Court put its seal of approval on such a system:

> We do not hold that in the present case the secretary was obligated to have a hearing or to give opportunity to the Wallace committee to answer any charges made against its group or to cross-examine any witnesses. * * *
>
> *State ex rel. Beck v. Hummel,* 150 Ohio St. 127, 80 N.E.2d 899, 905 (1948).

Since the District Court adopts and approves what it claims is the Ohio Supreme Court's interpretation of the loyalty oath statute, its decision means that a procedure blatantly violative of elemental due process requirements has now received federal judicial sanction.

III.

Ohio's Election Loyalty Oath Raises Substantial Equal Protection Questions Because the Democratic and Republican Parties Are Exempted From Having to Sign the Oath.

Under the provisions of the election loyalty oath statute, any political party whose origins in Ohio dated from a period subsequent to 1900 would have to file loyalty oath affidavits prior to every election. No such obligation would ever devolve upon the pre-1900 parties, i.e., the Democrats and Republicans.

As abhorrent to constitutional standards as the oath requirement is per se, the exemption above renders it particularly infirm. The double standard favoring the Democratic and Republican political parties, so pervasive

throughout the Ohio election code, is once again in evidence. The dominant two political parties may investigate, but not be investigated. Because of their longevity as Ohio political parties, they are immune from suspicion of "disloyalty" but they have license to suspect others and to bar them from the ballot. The exemption of the two major parties is absolutely untenable and indefensible and creates a classification bearing no reasonable relationship to any legitimate legislative objective. The classification is arbitrary, capricious and invidiously discriminatory against appellants and other third political parties. Since the rest of the statute is so pervaded with constitutional evil, the concluding section containing the exemption at least contributes an appropriate consistency.

One of the devices to restrict the right of suffrage that has been struck down is the so-called "grandfather clause." *Guinn v. United States,* 238 U.S. 347 (1915); *Lane v. Wilson,* 307 U.S. 268 (1939). Its resemblance to the exemption clause in Section 3517.07, Ohio Revised Code, is extraordinary. The grandfather clause was designed to limit the right to vote to those with the right paternity; the aim was to prevent Negroes from voting. The exemption clause in Section 3517.07, Ohio Revised Code is not even a sophisticated variation of this device. It is plainly and simply an attempt to deny the right to vote and the right to participate in the electoral process to certain minority groups.

CONCLUSION.

Because it violates free speech and associational rights; because it is overly broad in scope; because it is vague and uncertain; because it is procedurally infirm; and because it denies equal protection of the law, Ohio's election loyalty oath statute, Section 3517.07, Ohio Revised Code, should be declared unconstitutional and void. Substantial issues are posited by this challenge to the statute and the Court is respectfully urged to allow full plenary review to resolve those issues.

Respectfully submitted,

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